

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLEE AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILED FEB 28 1935

No. 10,484

STANCE JAMES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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No. 10,485

OLIVER W. JAMES, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA**

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QUESTIONS PRESENTED

1. Whether there was sufficient probable cause for the issuance of the arrest warrant for Oliver James, and for the search warrant authorizing a search of his home.

2. Can fruits of crime, which are not named in a search warrant, be seized by the officer making a search pursuant to the search warrant and to a valid arrest?

3. Was error committed when the trial court refused to allow appellants to have police progress reports, which it had read and determined to be of no value to appellants? Are appellants entitled to have the personal notes of the police officer, made during his investigation, when the officer did not use them to refresh his memory?

4. Does the doctrine of unexplained possession of recently stolen property apply where the evidence showed the appellant Oliver James on February 20, 1949, was in possession of a marked two and one-half dollar gold coin which had been stolen from the complaining witness' house on January 22, 1949? Is the fact that appellants, shortly after the commission of a larceny, had bills of similar denominations to those reported stolen a circumstance to be presented to the jury?

5. Is the testimony of a juror that the foreman told him he could not change his verdict of guilty to not guilty admissible to impeach the jury's verdict?

6. Is a wire recording of a telephone conversation between three witnesses admissible on cross-examination of one of those witnesses in an attempt to impeach him when the wire recording has never been identified?

7. Are arguments contained in the prosecutor's closing argument to the jury, which were based on facts in the record, grounds for reversal because it is alleged these arguments showed defense counsel to be guilty of misconduct?

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*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellants were tried on two counts of an indictment¹ charging housebreaking in the first count and grand larceny in the second count. The trial commenced May 11, 1949, and on Thursday, May 26th, the jury returned a verdict of guilty as to each appellant on both counts of the indictment.

¹ Count three of the indictment was dismissed prior to trial.

Prior to trial the appellants moved to quash the arrest and search warrants and indictment and to suppress and return evidence seized under the warrants. They alleged that there was no probable cause for the issuance of the warrants; that the articles seized were not named in the search warrants; and that articles were seized which were not named in the return upon the search warrant. On April 8, 1950, the motions were heard before Judge Edward Curran. Irving Lubore [misspelled Luborde in the transcript of the proceedings (R. 1391)] was called by the appellants as the first witness in support of their motion (R. 1391). He testified that he was a detective sergeant attached to Detective Bureau of the Metropolitan Police Department (R. 1391); that he secured the arrest and search warrants a little before midnight February 19, 1949² (R. 1396); that the information he had at the time the warrants were issued was as follows:

1. Beckley had made complaint to him that his house had been broken into and some things stolen (R. 1394).

2. Beckley had told him that as he returned home, he saw three men in the alley beside his house, and as he approached the automobile, two of the men were behind the door of the automobile and a third man stepped out and put a gun on him; that he thought they were loading a drunk into the automobile and he went into the house. He discovered the switch controlling the lights and burglar alarm had been pulled and that his basement door had been forced and his safe taken. (R. 1397, 1398).

3. That he received, from a source that he considered reliable, information that Stance James and Oliver James were responsible for the housebreaking. (R. 1407, 1408).

4. That he checked the source of this information (R. 1413, 1414).

5. That he received further information that Oliver James, in company with Stance and Louis Singleton, broke into Beckley's house and stole the safe and money. (R. 1417).

² At the beginning of the examination, defense counsel said January 19, 1949; but from the testimony, it is clear it was February 19, 1949.

6. That Beckley identified Stance James and Louis Singleton as two of the men involved in the crime before the warrants were issued (R. 1416, 1417).

7. That Oliver and Stance James were spending money in the same denominations as were reported stolen from the safe (R. —).

Cyril Lawrence, United States Commissioner for the District of Columbia, testified that he issued the warrants after a hearing in his apartment which lasted about three hours; that more evidence than appears in the affidavits was presented to him and that while he could not remember what this evidence was, it was related to what was contained in the affidavits. (R. 1419)

The court denied the motions to quash the warrants and the indictment and denied the motion to suppress. (R. 1845, 1846)

At the trial Charles H. Ward, Jr., Chief Deputy United States Marshal, was called as the first witness by the Government (R. 64). He testified that on February 20, 1950, he had a search warrant for the home of Oliver James at 1600 A Street, N.W., Washington, D. C. (R. 64); that at about 7:30 a.m. he went to the premises with Deputy Marshal McCatharan and Officers Lubore, Weissmer and a uniformed officer (R. 65); that he also had an arrest warrant for Oliver James (R. 65); that they were admitted by Mrs. Oliver James (R. 67); that he placed Oliver James under arrest and asked Officer Lubore to make a search of the premises as he had Oliver James in his custody (R. 67, 68). Ward was withdrawn at this time, subject to recall as a witness (R. 77). He was later recalled (R. 125) and testified that after the search, Lubore turned two packages of money over to him—one containing twenty-seven ~~thousand~~ and fifty dollars and one containing nineteen hundred and four dollars—mostly in denominations of one hundred dollar bills (R. 126, 127); that also some coins were turned over to him by Lubore at 1600 A St., N.E. (R. 127), and that Beckley identified these coins at police headquarters as coming from the safe (R. 147).

Richard H. Beckley was the next witness and he testified that he lived at 1800 New Jersey Avenue, N.W., in the District of Columbia (R. 78); that on January 22,

1949, he had a safe located on the second floor in a front room which he used for an office and in the safe he had between sixty and sixty-five thousand dollars in currency—one thousand dollar bills, five hundred dollar bills, one hundred dollar bills, fifty dollar bills, twenty dollar bills, ten dollar bills, five dollar bills, and a few one dollar bills; one hundred dollars worth of old coins; one five dollar gold piece; two two and one-half dollar gold pieces; and three or four thousand dollars worth of jewelry—watches, diamond rings, and two diamond stickpins (R. 78, 79); that on January 22nd he left home about 11:15 in the evening and went to 1213 You Street, N.W., and left there about 11:55 the same evening and returned home (R. 81-83); that as he approached his house he saw an automobile with the door open in the alley alongside his house, and some white material that looked like overalls was hanging down from the door and he went to investigate (R. 83); that when he got within two feet of the automobile the door was closed and he saw defendant Singleton (R. 83); that at that time he saw Stance James come out around the car with a gun and Stance said, "Back, back, and I mean back, back" and he, the witness, then went down New Jersey Avenue and into his house and found that the lights would not turn on (R. 84); that he noticed that there were pickets from the hall bannister on the floor, and he ran upstairs and found that his safe was missing and then ran back to the alley but the car was gone; that at that time he saw some canvas that had come from his cellar lying right where the door of the car had been opened and he then got in the taxicab and tried to find the automobile but could not. (R. 85) Beckley further testified that he went back to his house after reporting the case to precinct No. 2 and made further examination of the house; that he found that the master switch had been pulled, that the electric clock had stopped at 11:20, that the bannister at the top of the steps of the second floor had been broken out and prints of the wheels of the safe were on the stairs, that the cellar door and the door at the top of the basement steps had been jimmied, and that the house had been in perfect condition when he left earlier that evening

(R. 86-88); that some time after January 22nd Officer Lubore showed him a compartment of the type that was in the safe and that the keys which he had to his compartment opened the one shown him (R. 98-100). Beckley was excused from the witness stand and then was recalled (R. 168) and further testified that he had made an X-mark on one of the two and one-half dollar gold pieces, which had been in his safe, about six months before the safe was taken (R. 171); that the coin was in the safe on January 22nd when it was taken (R. 172); that he next saw the coin at police headquarters on the day the defendants were arrested—Lubore showed him some coins and at that time he saw the one with the X-mark on it (R. 174). Beckley then identified Government Exhibit 3A as the coin from his safe (R. 180).

Charles E. James was called as the next Government witness and testified that he was a brother of the defendants Stance and Oliver James (R. 463); that he saw Stance at his, the witness', place of business about a week after reading about the safe stealing and that at that time Stance wanted him to dispose of some thousand dollar bills which Stance told him he had gotten out of Mr. Beckley's safe (R. 464); that Stance told him another fellow planned the job and he and another fellow took the safe from the second floor to the alley while the first fellow was following Beckley and that this fellow came back and told them Beckley had left the pool room and was on his way home and that all three were in the alley when Beckley came and that he had put a gun on Beckley and backed him up (R. 465).

Under cross-examination, when a record was played out of the presence of the jury which purported to be a recording of a telephone conversation he had with two other witnesses in the case, Charles James denied that the voice on the record was his (R. 489). He further stated that about 2:05 a.m. on Wednesday of the week before he received a telephone call from Sneed and Flanders (who were witnesses in this case); that Sneed said he was home and had a summons from the prosecutor and wanted to know why Charles had given the prosecutor any information about him (R. 501); that the conversation he had over the tele-

phone with Sneed was about motorcycles (R. 502); that he called Sneed's home a little later and found that he was not there and that he then went to Mr. Mitchell's office where he saw Mr. Johnson and a Mr. Fox (R. 502).

Robert Sanberg was called as the next witness and testified that he was a member of the Identification Bureau, Metropolitan Police Department, and that he had not been able to get any fingerprints at 1800 New Jersey Avenue on January 23rd (R. 522-524).

Irving Lubore was the next witness for the Government and testified that he was a member of the Metropolitan Police Department and was on the safe assignment (R. 527); that he went to 1800 New Jersey Avenue about 1:00 a.m., January 23rd (R. 527); that on February 20th he was cruising with Beckley in the cruiser and at about 61st Street and Deanwood Beckley pointed out Stance James, who was driving a 1948 Cadillac, and they forced him to the curb and arrested him and then took him to police headquarters and questioned him; that at the police department he told Stance he knew that he and two others were responsible for breaking into Beckley's home and stealing the safe and contents, but that Stance denied doing it; that during the questioning he asked him about purchasing the Cadillac at \$3400 and Stance admitted purchasing the car (R. 530-536); that he asked him about the money that he had spent on remodeling the house at 1320 Ninth Street and Stance told him that he had hit the numbers, but would not say how much he had received (R. 540-541); that he asked Stance if he was working and Stance said "No" (R. 541). He further testified that on February 20th he went to Oliver James' house with the United States Marshal and upon searching the premises found one billfold containing about twenty-seven hundred dollars in one hundred's fifties, twenties, and tens, and that while Oliver first denied it was his he later said, "Anything you find in here is mine," and that in a locker he found another billfold containing about nineteen hundred dollars in denominations of hundreds, fifties, tens, and twenties, and he found some old coins in a dresser and that all this was

turned over to Mr. Ward (R. 542-545); that later Beckley was brought to police headquarters and he made an examination of the coins and showed the witness a cross-mark across the face on one of the two and one-half dollar gold pieces and the coins were then given back to Mr. Ward (R. 549); that Beckley had told him on a previous occasion that one of the gold pieces had a mark on it (R. 549). He further testified that he had never placed Charles James under arrest in this case (R. 554). He then testified that he asked Oliver James about his part in the Beckley matter and Oliver denied any part in it, and when asked about the money he found in his home, he said he had won it gambling (R. 580). Officer Lubore testified on Wednesday, May 18, 1949, that he could not identify the coin shown him, which was marked Government Exhibit 3A, as the one that he had seen at police headquarters (R. 589); that he had seen the same coin that had been at police headquarters the day before when he was on the witness stand (R. 588). He further testified that he did not ask the informers if the information they had given him had been obtained from someone else and that he had received information from them before and had always found their information reliable (R. 636-638).

Robert Maynard Wright was called as the next witness and testified that he was employed in February at the Haines Motor Company, 3715 Bladensburg Road, and that during that month he sold a 1948 Cadillac to Oliver and Stance James for \$3400 and that a five hundred dollar bill was given as a deposit and that he returned thirty minutes later and he was given six five hundred dollar bills in payment for the car (R. 683-687); that his best recollection was that Oliver gave him the money (R. 692); that the title of the car was placed in a woman's name (R. 688).

Robert A. Hartley was called as the next witness and testified that he was employed at the Harley Davidson Motorcycle Company and that on February 3rd or 2nd Oliver James bought a 1949 Harley Davidson Model 741

at a cost of \$995 and that he gave ten one hundred dollar bills in payment (R. 693-695).

Herbert Lacey was called as the next witness and testified that he was a heating and plumbing contractor and that he had a contract to do a plumbing job at 1332 Ninth Street for \$2050 and that this contract was obtained on February 1, 1949 (R. 696-701).

Raymond Otto Sneed was called as the first witness for the defense and testified that at one time he had been employed by Charles E. James (R. 814); that he saw Mr. Johnson (one of the defense counsel) at 2002 11th Street, N.W., on an evening in May 1949, and that while at this address, he and Dennis Flanders talked with Charles E. James by telephone (R. 815, 816); that he did not know whether this conversation had been recorded (R. 819); that he did not remember having any conversation about a bicycle (R. 823) and that he was at Mr. Mitchell's office (2002 11th Street, N.W.) about two and one-half hours (R. 856).

Dennis Winen Flanders was called as the next defense witness and testified that he had worked for Charles E. James and that Charles had promised him a motorcycle (R. 893); that he had a conversation with Mr. Johnson at 2002 11th Street, N.W., and stayed there between four and four and one-half hours and that while there had had a conversation with Charles James over the telephone and that James had said that he had not turned his brothers in but that his sister had (R. 894-904); that he had gone to Mr. Mitchell's office because Mr. Johnson had sent for him (R. 901).

Mary E. James Hawkins was called as the next defense witness and testified that she was the sister of Stance and Charles James and had heard Charles tell her mother that she, the witness, had informed the police something about Stance (R. 913-914).

Stance W. James testified in his own behalf and stated that on the night of January 22nd, he did not pull a gun on Beckley (R. 927); that he had won \$10,500 on the number 001, having bet \$15 (R. 930-931); that he had played the

numbers with a man named Dikes in Maryland (R. 970); and that he had never been at the Beckley residence.

SUMMARY OF ARGUMENT

I

A search warrant is properly issued when the affidavit in support of it alleges, and the police officer who made the affidavit testified, the information he based it on was obtained over a period of time and part of which was that Beckley reported his residence broken into and certain things taken; that he received information from a source he considered reliable that Oliver and Stance James were responsible for the job; that he received information from another source that the two Jameses were two of the parties responsible for the housebreaking and that this informer told him the source of his information and he checked this party; that Beckley identified Stance James and Louis Singleton as two of the three men who were at the automobile which was alongside the house the night of the housebreaking and that Oliver had spent a thousand dollar bill, one of the denominations reported stolen about ten days after the crime was committed.

II

An officer who is legally in a premises pursuant to a search warrant may seize fruits of crime even though these fruits of crime were not enumerated in the search warrant.

III

A police progress report subpoenaed by appellants was properly denied them when the court read the report and determined that it would not be helpful to them. Notes made by a police officer of his investigation are not available to appellants unless the officer has used them to refresh his memory when he testifies.

IV

The doctrine of possession of recently stolen property was limited to Oliver James by the court's instruction and

this instruction was justified from the evidence which showed that Oliver James on February 20, 1949, was in possession of a two and one-half dollar gold coin, identified by an X-mark, which was stolen along with other property from Richard Beckley's home on January 22, 1949. The jury was instructed correctly that possession of bills of the same denominations as those reported stolen was a circumstance which it could consider along with the other evidence but that no inference was to be drawn from this fact.

V

The trial court should not consider testimony of a juror to the effect that he had agreed to the verdict, but expressed a desire to change his verdict, but was prevented from doing so by the foreman of the jury who told him he could not change his verdict once he had arrived at it, as such testimony goes to matters which essentially inhere in the verdict itself.

VI

The trial court did not commit error when it excluded a purported wire recording of a telephone conversation between witnesses where appellants requested to be allowed to play the recording during cross-examination of a witness when the recording had not been properly identified. Appellants did not again offer the recording nor was it ever properly identified and therefore there is no basis to allege the trial court excluded it from evidence.

VII

The prosecutor's argument that appellants or their counsel were trying to defeat justice was justified where the evidence showed that, when one of the principal Government witnesses went to one of the defense attorneys and told him that his family wanted him to retract a statement he had made to the prosecutor, this attorney sent the witness to another attorney rather than to the prosecutor; that defense counsel had two of the witnesses in one of their offices from nine in the evening to approximately two

in the morning and during this time a wire recording was made of a telephone conversation between these two witnesses and another witness; and that a marked two and one-half dollar gold coin which was in evidence was taken and another with a slightly different mark was put in its place sometime during two days of the trial.

ARGUMENT

I

The Face of the Affidavit as Well as the Testimony of the Police Officer Show That the Search and Arrest Warrants Were Issued Upon a Showing of Probable Cause

In considering this point the appellee desires that the Court consider, in addition to the pages certified by appellant, the following record pages: 636-638, 1391-1419, 1845-1846.

Appellant Oliver James urges that the warrant for his arrest and the search warrant authorizing the search of his home were both issued without probable cause (Br. 10). The first query is what is meant by "probable cause"? In *Shore v. United States*, 60 App. D.C. 137, 49 F. 2d, cert. denied 283 U.S. 865, this Court said:

"Probable cause", as defined by the Supreme Court, is "reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged." *Dumbra v. U. S.*, 268 U.S. at page 441, 45 S. Ct. 546, 548, 69 L. Ed. 1032.

See also *United States v. Lashomb*, 59 F. 2d 809.

Recently the Supreme Court in *Brinegar v. United States*, 338 U.S. 160, 175, defined probable cause as follows:

"The substance of all the definitions" of probable cause "is a reasonable ground for belief of guilt" *McCarthy v. De Anuit*, 99 Pa. St. 63, 69, quoted with approval in the *Carroll* opinion. 267 U.S. at 161. And this "means less than evidence which would justify condemnation" or conviction, as Marshall, C.J., said for the Court more than a century ago in *Locke v.*

United States, 7 Cranch 339, 348. Since Marshall's time at any rate, it has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their [the officers] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. *Carroll v. United States* 267 U.S. 132, 162.

The *Brinegar* case repudiates such cases as *Grau v. United States*, 287 U.S. 124, cited by appellant in support of his contention (Br. 11) that the affidavit in support of a search warrant must state facts in the personal knowledge of the affiant. 338 U.S. at 174-175, footnote 13.

The second query is was there probable cause to issue the search warrant and the arrest warrant?³ From appellant's brief it is difficult to tell whether he is attacking the affidavit in support of the search warrant on the grounds it does not state probable cause, upon its face, or attacking the facts upon which the officer based his affidavit on the grounds the evidence available to the officer did not give him probable cause to justify the allegation of facts in the affidavit. A reading of the affidavit in support of the search warrant (R. 1433) will show that it states on its face probable cause for the issuance of the search warrant by the United States Commissioner.

Furthermore, as we have shown (*supra*, p. 3), the commissioner took oral testimony in support of the affidavit prior to issuing the warrants. Appellants apparently realized this for, at the preliminary hearing on their motions to suppress and return evidence and motions to quash the arrest warrants and indictment, they did not proceed on the ground the affidavit was faulty but adduced testimony to show the officer did not have grounds upon which to base his affidavit. If they were proceeding on the theory the affidavit was on its face bad there would have been no need to take testimony. The following ex-

³ This point involves only appellant Oliver W. James whose appeal number is number 10,485.

cerpt from the affidavit shows ample probable cause for the issuance of the search warrant:

And that the facts tending to establish the foregoing grounds for issuance of a search warrant are as follows:

Information and investigation has revealed the above property was taken from Richard H. Beckley by Oliver William James, Stance Wallace James, and Louis Henry Singleton, by breaking and entering the home of Richard H. Beckley at 1800 New Jersey Avenue, N.W., Washington, D. C., and stealing his safe which contained \$60,000 in money and more than \$4,000.00 in jewelry and the affiant has reason to believe that said Oliver William James has more than \$18,000 of said property secreted on his premises 1600 A Street, S.E., Washington, D. C.

The testimony of the officer at the preliminary hearing and at the trial shows that there was abundant evidence from which a cautious man would believe that appellant Oliver James was guilty of the offense charged. Briefly stated that evidence was that Beckley had made a complaint that his residence had been broken into and certain things taken therefrom (R. 1394); that he received information from a source he considered reliable that Oliver and Stance James were responsible for the job (R. 1407, 1408); that he received information as to Oliver over a period of time (R. 1411); that he received information from another source that the two Jameses were two of the parties responsible for the housebreaking (R. 1415); that this informer told him the source of his information and he checked this party (R. 1413, 1414); that Beckley identified Stance James and Louis Singleton as two of the three men who were at the automobile which was alongside the house the night of the housebreaking (R. 1416, 1417); and that Oliver had spent a thousand dollar bill, one of the denominations reported stolen, about ten days after the crime was committed. From this it is seen there was probable cause for the making of the affidavit and the issuance of the search warrant.

II

An Officer Who Is Searching Premises Under a Legal Search Warrant and As an Incident to a Lawful Arrest May Seize Fruits of Crime Not Listed in the Search Warrant

In considering this point appellee desires that the Court consider, in addition to the pages certified by appellant, the following record pages: 64-68, 78-79, 125-127, 146-147, 171-174, 180, 542-545, 549, 588-589.

Appellant urges that the evidence which was seized but which was not specifically enumerated or called for on the face of the search warrant was seized in violation of his constitutional rights (Br. 13). The Fourth Amendment to the Constitution forbids unreasonable search and seizure. *Carroll v. United States*, 267 U.S. 132. The question involved here is whether the seizure of the three gold coins was an unreasonable seizure. As the Supreme Court said in *United States v. Rabinowitz*, 339 U.S. 56:

What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are "unreasonable" searches and, regretably, in our discipline we have no ready litmus—paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. *Go Bart Co. v. United States* 282 U.S. 344.⁴

In the instant case the facts and circumstances were as follows:

1. The officer was making the search pursuant to a valid search warrant. (For the purposes of discussing this point the validity of the search warrant and arrest warrant is assumed by appellee as it was by appellant. (Br. 13))
2. Appellant was arrested in the premises searched pursuant to a valid arrest warrant.
3. The three gold coins seized were fruits of crime and as such were more than mere evidence of a crime being committed or having been committed.

⁴ While the *Rabinowitz* case was discussing searches it is submitted the same reasoning should be applied to seizures.

Assuming the validity of the search warrant and the arrest warrant, it is seen that the officers were legally in the premises and had the right as well as the duty to search the premises. If, while conducting this legal search they come across fruits of the crime not set forth in the search warrant, can they rightfully seize these fruits of crime or must they overlook them and leave them behind? The first half of this question should be answered affirmatively. In *Paper v. United States*, 53 F. 2d 184, the officers had an arrest warrant for appellant and while attempting to find him they found a quantity of liquor in his cellar. On his trial for violation of the National Prohibition Act, the lower court admitted into evidence the fact that this quantity of liquor was found. The appellant alleged that the liquor was obtained in violation of his constitutional rights. In affirming the conviction the Circuit Court of Appeals for the Fourth Circuit said:

We think there can be no question but that the evidence was admissible. The purpose of the Fourth Amendment was to prevent the use of "government force" to search a man's house, his person, his papers or his effects and to prevent their seizure against his will. *Olmstead v. United States*, 277 U.S. 438 * * *. Most cases of search in violation of this constitutional provision involve the element of trespass, i.e., the entry without right upon the premises of the citizen. And all cases of unlawful search will be found to involve either this element or some element of fraud or subterfuge, as where an arrest is made a pretext for a search, or where the right to search having been obtained ostensibly for one purpose is used in reality for another. *Henderson v. U.S.* (C.C.A. 4th) 12 F. 2d 528, 51 A.L.R. 420; *Thompson v. U.S.* (C.C.A. 4th) 22 F. 2d 134. But where the entry and search are rightful and there is present no element of trespass a fraudulent invasion of the rights of the citizens, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers, in this case, had discovered in the cellar a counterfeiting plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?

See also *Harris v. United States*, 331 U.S. 145; *Steele v. United States*, No. 1, 267 U.S. 498; *Bennett v. United States*, 145 F. 2d 270, certiorari denied 323 U.S. 788, *United States v. Old Dominion Warehouse, Inc.*, 10 F. 2d 736; *Milam v. United States*, 296 F. 629, certiorari denied 265 U.S. 586.

In any event appellant Oliver James was arrested under authority of an arrest warrant and for this reason the search and the seizure of the gold coin was valid. Appellants urge that an arrest warrant cannot be used to supplement a search warrant and thereby make valid a seizure which would be bad if only the search warrant was involved (Br. 15). The Supreme Court has repudiated this argument in *Marron v. United States*, 275 U.S. 192.⁵ In the *Marron* case a prohibition agent obtained a search warrant for the second floor of 1249 Polk Street, which particularly described the things to be seized as intoxicating liquors and articles for their manufacture. Marron was the lessee of the second floor of 1249 Polk Street. After receiving the search warrant four agents went to the premises and found one Birdsall in charge. Birdsall was handed the warrant and placed under arrest—the court ruled the arrest was good as he was actually engaged in a conspiracy to maintain, and was actually in charge of, premises where intoxicating liquors were being unlawfully sold. Such premises were declared common nuisances by the National Prohibition Act and therefore Birdsall was committing a crime in the presence of the officers. The resulting search of a closet in the premises disclosed a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business. The Supreme Court ruled the seizure valid on the theory it was incident to a lawful arrest even though the search warrant did not enumerate the ledger. As the appellant Oliver James was lawfully arrested pursuant to an arrest warrant the search of the premises in his immediate possession and control was lawful as was the seizure of the gold coin.

⁵ Cited with approval in *United States v. Rabinowitz*, 339 U.S. 56.

III

When Confidential Police Files Are Produced as Required by a Subpoena No Error Is Committed When the Court Refuses to Allow Appellants to Read the Files After the Court Has Read Them and Determines They Would Be of No Aid to the Appellants. Notes Made by an Investigating Police Officer Are Not Available to Appellant Unless the Officer Uses Them to Refresh His Memory When He Testifies

In considering this point appellee desires that the Court consider, in addition to the pages certified by appellant, the following record pages: 155-165, 611-614.

Appellant urges that the trial court committed reversible error when it denied him the alleged right to read the police progress report contained in the police file. (Br. 17). The record shows that twice appellants were denied access to records or memoranda kept by the Police Department—the first occasion dealt with a police progress report (R. 155-165); the second occasion dealt with personal notes belonging to the investigating officer (R. 611-614). It was on the second occasion that the court tore off part of the memorandum which it considered confidential (R. 613, 614). For purposes of clarity the Government shall discuss each occasion separately.

The first occasion deals with records of the Police Department subpoenaed by the appellant (R. 155-158). The records were produced by the Police Department and the representative of the Police Department stated the Department took the position that one of the two reports in the file was a public record and available to appellants and one was a confidential report that should not be made available (R. 160). After reading both reports the court made one report available to appellants (R. 161). It ruled the other report, referred to as the progress report, was confidential and not open to inspection by appellants (R. 161). The cases cited by appellants to support his contention that these reports should have been made available to them are all from the United States Court of Appeals for the Second Circuit or a District Court in that Circuit. The Court of

Appeals for the Second Circuit recognized that it was holding contra to a decision of this Court when in *United States v. Krulewitch*, 145 F. 2d 76, it stated:

The Court of Appeals of the District of Columbia does indeed appear to have decided otherwise in *Arnstein v. United States*, 54 App. D.C. 199, 296 F. 946, 950; but the point that the prosecution had surrendered its privilege by calling the witness, does not appear to have been brought to the court's attention; and in addition the accused had in any event failed to lay the proper foundation for using the statement.

From a reading of those cases cited by appellant it is clear that the procedure adopted in that jurisdiction is for the report or statement to be produced and the court read it and if it determines the report or statement to be relevant, make it available to the defendant. This procedure was approved in *United States v. Coplon*, — F. 2d — (C.C.A. 2). Actually that procedure was followed by the court here. This is seen from the following excerpt from the transcript.

MR. JOHNSON: Just a minute. With respect to this and the arrest of these defendants, I want to make my position clear, that there was no proper ground to arrest these defendants. The police knew nothing with reference to that. If we can demonstrate that during this trial, we give no credit because of the fact that they are police officers, that they can come in and say this is confidential, and we will never be able to find out under the present circumstances.

THE COURT: As to what?

MR. JOHNSON: Whether there was probable cause.

THE COURT: You will not find it out from that green sheet. I have seen enough of that, one of them there you will have, but the other one won't do you any good if you did have it, and I am not going to let you have it or require the police department to produce it. (R. 160, 161)

From this it is seen that the reason the progress report was subpoenaed was for the purpose of showing there was no probable cause for the warrants. The court examined it and determined the progress report would not be relevant. Having followed this procedure, which is approved in the

cases appellants cite, the Government cannot see how appellants can complain of the court's action.

It should also be noted that the records requested here are entirely different than any that the courts have ever ordered produced and made available to a defendant. In the *Krulewitch* case, *supra*, the record was a prior statement of a witness which was admittedly in contradiction to her statement from the witness stand. There the court held it should have been made available for cross-examination purposes. In the case of *United States v. Watkins*, 67 F. Supp. 556, the records requested were the Attorney General's file concerning the relator. The court ruled that the records could be subpoenaed but added that the court should read them to determine their relevance. In the case of *United States v. Beekman*, 155 F. 2d 580, the records subpoenaed allegedly showed that certain Government witnesses had been disciplined for similar acts charged against the defendant. The Court of Appeals said if these allegations were true "the trial judge should have read the records to determine whether they contained data showing previous disciplining of these witnesses." The record involved here is a police progress report which from its very name is a report kept by the Police Department of the progress made toward the solution of a crime. While the record before this Court does not show what was in the report it is not hard to envision what would be in such a report. Such reports undoubtedly carry tips received by the Police Department from informers along with the name of the informer. This Court has recognized that names of informers should not be disclosed. *Shore v. United States*, 60 App. D.C. 137, 49 F. 2d 519. It is also apparent that much hearsay which would not be admissible would be contained on such a report. Thus it is seen that such a report which is only used within the Police Department should not be subject to subpoena by appellants.

The second time the court denied appellants' request for memoranda was later in the trial and concerned personal notes of the police officer. The notes consisted of

the report of what was stolen and of the officer's own personal investigation. (R. 611-613). The court ruled that the appellants might have that part of the notes which referred to what was reported stolen, but refused to order the police officer to turn over to appellants that part of his notes which covered his personal investigation (R. 613). By allowing appellants to inspect any of the notes belonging to the officer the court was granting appellants more than they had a right to demand or expect. The officer had not used the notes at any time to refresh his memory, and, therefore, appellant was not entitled to the production of the notes or inspection of them. *Goldman v. United States*, 316 U.S. 129; *Mullaney v. United States*, 82 F. 2d 638; *Lennon v. United States*, 20 F. 2d 490. Therefore, appellants had no right to inspect the officer's notes and the court did not commit error when it tore off part of the notes and allowed appellants to inspect part of them.

IV

The Doctrine of Possession of Recently Stolen Property Was Correctly Applied by the Trial Court to Oliver James Only, and Evidence of Possession of Bills in the Same Denominations as Stolen Was Admissible as a Circumstance to Be Considered by the Jury

In considering this point appellee desires that the Court consider, in addition to the pages certified by appellant, the following record pages: 78-85, 126-127, 147, 168-174, 180, 549, 588-589.

Appellant urges that the trial court committed prejudicial error in instructing the jury on the doctrine of possession of recently stolen property along with the inference that arises from the sudden acquisition of wealth without safeguards in their application to the circumstances in this case (Br. 20). Before being allowed on appeal to assign as error any portion of the charge or omission therefrom, appellants must object to the charge before the jury retires to consider its verdict and must state distinctly the matter to which he objects and the grounds of his objection.⁶

⁶ Rule 30, Federal Rules of Criminal Procedure.

After the court had finished its charge to the jury, the following occurred concerning the instruction on recently stolen property:

* * * * *

Gentlemen, I have covered my notes and I don't think of anything else. Have any of you anything else to suggest?

* * * * *

Mr. MITCHELL: I notice that Your Honor gave an instruction that possession of the fruits of crime that has recently been committed, I don't think that is proper under the circumstances, because the statement by Mr. Beckley was, as far as the coins were concerned, there has been no identification, and in addition to that Beckley said the last time he saw those coins was six months prior. I have known of one month, the next was three months, but I have never known one as much as six months, because you are inferring to them that the coins were there on January 22.

The COURT: I don't think I will change that.

Mr. JOHNSON: Isn't this true, in order to show: Your Honor admitted coins on the theory, regardless of their being identified as property, they were admitted in evidence as three metal objects, we are going right back, but this is the thing we argued, after you admitted these three objects, the motion should be granted. Here is what—

The COURT: Are you going to argue that all over again?

Mr. JOHNSON: No, I am not arguing that all over again, but I think in order for them to consider the fruits of crime they have got to be absolutely identified.

Mr. MITCHELL: And he didn't identify as to the other.

Mr. JOHNSON: He says, "I can find the marks I put on it," and Mr. McLaughlin has assumed that there is no identification by Beckley.

Mr. MITCHELL: Am I entitled to an instruction that if they find it is not the coin in question they must find Oliver James innocent?

The COURT: No, the gold coin in evidence is not like the denominations of the currency.

Mr. JOHNSON: But don't you think that would pertain in a case in which the man would say he had every denomination?

The COURT: It is a circumstance. I will do this, I will amend, not as to all three coins, but as to the one he marked.

Mr. McLAUGHLIN: The other two being similar.

The COURT: The other two being similar.

Mr. MITCHELL: I object to that. If Your Honor is going to comment as to what the coin was, the record will show it, Your Honor. I would like to say that I am going to insist certainly again, if he is going to say anything about these identical coins at all, which I say at this point Your Honor cannot do because you have already given them a charge on recently stolen goods, and I am likewise entitled to an instruction that if they do not have those identical goods I am entitled to a verdict of not guilty (R. 1345-1350).

After this discussion, the court instructed the jury as follows on possession of recently stolen property:

* * * * *

I also, when I told you that there was a principle of law that the possession of the fruits of crime recently committed entitled you to infer that it was guilty possession, unless the circumstances accounted for it in some other way. Now, that would have reference to a gold coin which was alleged to have been taken from the property and identified, according to Mr. Beckley, as the one he had in his possession, because then it becomes identical property, and to that extent only would it apply. It would not apply to the other two gold coins because Mr. Beckley never said he could identify the other two gold coins, but in that regard the possession of those two gold coins are not exactly in the same category as the possession of currency. If the denominations of the currency are similar you may consider it as a circumstance. You do not infer from that alone, but you may consider it as a circumstance with others.

The fact that there were two gold pieces, but of the same denomination, that is a circumstance you may take into consideration with the other evidence.

* * * * *

I think that is all. I will send the indictment to you in a few minutes.

Now that I have charged the jury, Mr. Baxter, I will excuse you with Court's thanks, and I will ask you not to discuss this case at all until the verdict of the jury has been received.

Mr. Marshal?

All right, that is all. (R. 1351-1354)

(Thereupon at 2:50 o'clock p.m. the jury retired to consider of its verdict.)

After this additional instruction, there was no objection by either appellant. As appellants did not comply with Rule 30 of the Federal Rules of Criminal Procedure, they cannot now allege error in the charge. *Villaroman v. United States*, — U. S. App. D. C. — (decided July 24, 1950). See also *Lanham v. United States*, — U. S. App. D. C. — (decided November 2, 1950) and *Coates v. United States*, — U. S. App. D. C. — (decided October 16, 1950).

In any event appellant's allegations concerning the charge are not supported by a reading thereof. The doctrine of possession of recently stolen property was applied only to the gold coin marked by Beckley and not to the monies found in possession of both Stance and Oliver James as claimed by appellants (Br. 23). This is entirely clear when the following excerpts from the charge are read:

Now, that would apply in the case of the instruction I just read to you, would apply in the case of Oliver James in respect of the gold coins. The fact as alleged by Government witnesses that the defendant Oliver James also had in possession currency, and that Stance James had in his possession currency, would not have this rule to that set of circumstances because it has not been identified as the currency which Beckley said he had in his house when it was taken from him, yet the fact, if it is a fact, that the denominations of the bills, some or all of them, were the same denominations as some of the bills which Mr. Beckley said he had, is a circumstance which you may consider along with the other evidence in the case in determining whether or not the defendant is guilty. (R. 1341)

When the court's attention was drawn to the fact he referred to "coins" he instructed as follows:

I also, when I told you that there was a principle of law that the possession of the fruits of crime recently committed entitles you to infer that it was guilty possession, unless the circumstances accounted for it in some other way. Now, that would have reference to a gold coin which was alleged to have been taken from the property and identified, according to Mr. Beckley, as the one he had in his possession, because then it becomes identical property, and to that extent only would it apply. It would not apply to the other two gold coins because Mr. Beckley never said he could identify the other two gold coins, but in that regard the possession of those two gold coins are not exactly in the same category as the possession of currency. If the denominations of the currency are similar you may consider it as a circumstance. You do not infer from that alone, but you may consider it as a circumstance with others.

The fact that there were two gold pieces, although not identified, as the two gold pieces, but of the same denomination, that is a circumstance you may take into consideration with the other evidence. (R. 1351-1352)

Thus we see the doctrine of possession of recently stolen property was limited to Oliver James and his possession of the marked gold coin. That there was evidence to justify an instruction on possession of recently stolen property limited to the coin in Oliver James' possession is clearly seen from the testimony that on the night of January 22, 1949, the home of Richard Beckley was entered and a safe was taken containing among other items a marked two and one-half dollar gold coin and that on the day of February 20, 1949, Oliver James was arrested and there was found in his possession a marked two and one-half dollar gold coin which was identified by Beckley by the mark as the two and one-half dollar gold coin which was taken from his house on January 22, 1949.

Appellants also allege that the trial court ruled the jury might draw "an inference" from the fact the appellants were in possession of bills of the same denomination as were reported stolen (Br. 23). The trial court never in-

structed the jury on the doctrine of sudden acquisition of wealth. Under that doctrine the jury may convict on sudden acquisition of wealth alone. *Hansborough v. United States*, 156 F. 2d 327; *Neal v. United States*, 102 F. 2d 643. That the court did not intend to convey to the jury the doctrine of sudden acquisition of wealth is seen from a reading of the charge. After instructing on the doctrine of possession of recently stolen property the court said:

* * * .The fact as alleged by Government witnesses that the defendant Oliver James also had in possession currency, and that Stance James had in his possession currency, would not have this rule to that set of circumstances because it has not been identified as the currency which Beckley said he had in his house when it was taken from him, yet the fact, if it is a fact, that the denominations of the bills, some or all of them, were the same denominations as some of the bills which Mr. Beckley said he had, is a circumstance which you may consider along with the other evidence in the case in determining whether or not the defendant is guilty.

After a discussion at the end of the charge the court further charged the jury:

* * * It would not apply to the other two gold coins because Mr. Beckley never said he could identify the other two gold coins, but in that regard the possession of those two gold coins are not exactly in the same category as the possession of currency. If the denominations of the currency are similar you may consider it as a circumstance. You do not infer from that alone, but you may consider it as a circumstance with others.

Thus it is seen that the jury was told only that the possession of similar bills of the same denominations was a circumstance which it could consider along with the other evidence and was told no inference was to be drawn from that alone. Possession of similar bills or coins as those stolen is a circumstance which the jury may consider along with all the other evidence. See *United States v. Candler*, 65 F. 308; *Hicks v. State*, 13 So. 375; *Leonard v. State*, 22 So. 564; *Barker v. State*, 28 So. 685; *Allen v. State*, 155 So.

894; *State v. Burns*, 52 P. 316; *Buckine v. State*, 49 S. E. 257; *Brandt v. State*, 90 S. W. 2d 263; *Davis v. Commonwealth*, 159 S. W. 607; *State v. Schuck*, 114 A. 562; *Kaiser v. State*, 53 N. W. 610 (conviction reversed as such possession alone did not warrant conviction). Thus it is seen there was no error in the court's instruction on the possession of bills of similar denomination as those stolen.

Consequently, there is no merit in appellants' contention that there was error in the court's charge.

V

The Trial Court Should Not Consider Testimony of a Juror Attacking the Verdict Where Such Testimony Touches Matters Which Essentially Inhere in the Verdict and There Is No Evidence of Coercion

In considering this point appellee desires that the Court consider, in addition to the pages certified by appellant, the following record pages: 1804, 1812-1821, 1824-1825.

Appellant urges that the trial court should consider the testimony of a juror who claims that the verdict he rendered was coerced by a fellow juror and therefore he was prevented from returning his true verdict expressed in the jury room (Br. 26). Actually the trial court did receive the testimony (R. 1804) and had counsel for all parties submit written memoranda on whether the testimony was sufficient to cause a new trial to be ordered (R. 1841). The question presented to this Court is, does the testimony of the juror Jones, which was heard on a motion for new trial, furnish a ground for the granting of a new trial.

Prior to the hearing on the motion for new trial the facts concerning the verdict were that on returning to the court room the foreman announced that the jury had agreed upon a verdict (R. 1360); that both appellants were guilty on count No. 1 of the indictment (R. 1360); that both appellants were guilty on count No. 2 of the indictment (R. 1361); the jury was polled (R. 1361); and when Jones was asked what his verdict was as to each appellant he replied "Guilty".

On May 31, 1949 a Motion for New Trial was filed and a hearing was held on August 1 and 2, 1949. At this hearing

Juror Jones was allowed to testify. His testimony is contradictory in places but the following excerpts show what happened. The following questions are by the court and the answers by Jones:

Q. When the jury took the first vote, which one of the defendants did they vote on? All three of them, or just one?

A. One—Singleton.

Q. How did you vote?

A. Not guilty.

Q. Then they took a vote on whom, next?

A. Oliver.

Q. How did you vote?

A. Not guilty.

Q. Then they took a vote on Stance James?

A. Last.

Q. What?

A. Yes.

Q. How did you vote?

A. Not guilty.

Q. All of that was before 10 o'clock at night?

A. No, sir.

Q. How much of it was before 10 o'clock at night?

A. Singleton and Oliver.

Q. You had voted on Singleton and Oliver?

A. Yes.

Q. Well, when you came in at 10 o'clock, was the jury in agreement as to Oliver James?

A. No, sir. We was through with Singleton and on Oliver, and after that we took Stance.

Q. But you had not at the time you came in at 10 o'clock agreed on Oliver one way or the other?

A. No.

Q. When you went out after 10 o'clock, what happened?

A. And we went out? What do you mean? Came back in the jury room?

Q. Yes.

A. Well, nothing happened, no more than they persuaded me down that he was guilty, so I just turned over on their side and voted "Guilty."

The COURT: There you are.

By the Court:

Q. Did anybody force you to vote "Guilty"?

A. Force me?

Q. Force you.

A. No, sir, they didn't force me to.

Q. Did anybody tell you that you had to vote "Guilty"?

A. No, sir; they didn't tell me I had to vote "Guilty," no, sir.

Q. When you came back in here, at whatever hour it was, with the jury to deliver the verdict on all three of them do you remember the Clerk asking each one of you individually?

A. Yes, sir.

Q. What your verdict was?

A. Yes, sir.

Q. Did you understand then that you had a right to give whatever verdict you actually thought should be given?

A. No, sir.

Q. What did you think that was all about?

A. Well, I didn't—I didn't know that I could say "Not Guilty" there after it was "Guilty" in the jury room.

Q. Did anybody in the jury room or out of the jury room ever tell you that you had to vote "Guilty" for either Stance James or Oliver James?

A. No, sir, nobody ever told me anything.

The COURT: Go ahead.

By Mr. Johnson:

Q. But, Mr. Jones, this is true, isn't it: that when you got—Before you left the jury room, had you not informed the remaining jurors that if they were going to bring in a verdict of not guilty for Singleton, you wanted to change your verdict to "Not Guilty" for James?

A. Yes, sir.

Q. At that time, when you informed the rest of the jurors of that fact, did any juror or any person tell you you could not do that?

A. Mr. — I can't recall his name now—Mr. — the foreman of the jury.

By the Court:

Q. What did he say?

A. He said after we had voted one way, we couldn't

vote no other. We couldn't change it. It was against the rules to change it.

By Mr. Johnson:

Q. What did you think would have happened to you, or did anybody inform you or give you any impression as to what would happen to you, if you did change your verdict when you were asked by the Court, after you had voted in the jury room once for "Guilty"?

A. Well, he didn't say what would happen, but he said it was against the law, and you couldn't do that.

By the Court:

Q. Are they your words or his words: "Against the law"?

A. Well, that is his.

Q. Did he say it was against the law?

A. Well, now, I wouldn't say he said that—"Against the law"—but he said you couldn't do that; after you voted one way, you had to stick.

By Mr. Johnson:

Q. You understood it was a violation of some rule or law or practice?

A. That is what I had in mind.

Q. And that as a result, if you did that, something would happen to you; is that correct?

A. That is what I had in mind.

Q. That was what you gathered from his conversation with you when you told him, in the presence of the other jurors, that you wanted to bring in a verdict of "Not Guilty" for James; is that correct?

A. After they acquitted Singleton, I wanted to acquit Stance and Oliver.

Q. Before you left the jury room, you told them you wanted to change, after you had voted for Stance; is that correct?

A. I told them I didn't see where we could find Oliver and Stance guilty and acquit Singleton.

Q. In other words, you told them—

Mr. McLAUGHLIN: I object to "In other words."

The COURT: You have no right to tell him.

Mr. JOHNSON: If Your Honor please, I do not want to, but I want to try to develop what I know he is going to testify to.

By Mr. JOHNSON:

Q. I have asked you on three occasions, haven't I?

A. Yes.

Q. The first occasion was that afternoon—that evening—when you spoke to me in the jury room; is that correct?

A. That is correct.

Q. I saw you on one other occasion prior to this morning, did I not?

A. That is correct.

Q. When was that, if you recall?

A. Well, it was on Saturday at my house.

Q. Did I take you or tell you anything at that time?

A. Yes, you asked me some questions. You asked me would I sign an affidavit.

I said, "Yes," but you never came back.

Q. After that I never came back to you any more?

A. No.

Q. I never talked to you about this case until I saw you this morning?

A. In the hall this morning.

Q. Tell me this, now: If you had the prerogative of rendering a verdict that you thought you could not render, because you thought it violated some law or rule—if you were to render a verdict now as to guilt or innocence, now that you have been told by His Honor, and by me in his presence, that nothing could have happened to you, and it was your right, if you wanted to, to say "Not Guilty," when you were polled—if you were asked that question now, whether in your mind as a juror Stance James was guilty or innocent, which would you say? Guilty or innocent?

Mr. McLAUGHLIN: I object, Your Honor.

The COURT: I sustain the objection.

By Mr. JOHNSON:

Q. Was the only reason that you did not say, "Not Guilty," in the jury room that night, when you were polled, because you had been warned or advised that you could not change your verdict?

A. Yes.

Mr. McLAUGHLIN: I object to that.

The COURT: I will let the answer stand.

By Mr. JOHNSON:

Q. Did you understand by that, or were you given to understand by that, that something harmful—or that you would be embarrassed or humiliated or censured in some way by some official if you had not—

Mr. McLAUGHLIN: I object to that.

The COURT: I sustain the objection to that.

By Mr. JOHNSON:

Q. I want to ask you some other questions.

During the course of your jury deliberations, were there or were there not any remarks having nothing to do with the evidence in this case, having nothing to do with the law in this case, addressed by any member of the jury, in your hearing, which were derogatory or showed a bias or a prejudice against Mr. Mitchell and me, or either one or both of us?

Mr. McLAUGHLIN: I object, Your Honor.

The COURT: Sustained.

Mr. JOHNSON: If Your Honor please, I would like to show that this witness who took the stand yesterday and denied actually making these statements did exhibit bias and prejudice against us for matters over and above the evidence and was the leading force in arguing for the conviction.

Then, in addition, I want to put one other witness on the stand. I will tender that evidence to Your Honor before I do so.

The COURT: Let us finish with this witness.

Mr. JOHNSON: I have finished with him. I think that is about all. May I ask him this, now that his testimony is in? I don't know whether he is twisted or what.

By Mr. JOHNSON:

Q. As a matter of fact, Mr. Jones, for the first three ballots, weren't the jury—although you balloted on each one of the defendants earlier in your balloting, wasn't that merely to find out how near you were together?

Mr. McLAUGHLIN: I object.

The COURT: I sustain the objection. Do not answer that.

By Mr. JOHNSON:

Q. As a matter of fact, did not the first acquiescence of all the jurors in the guilt or innocence of a person—of one of the defendants—occur when you found Stance James guilty?

Mr. McLAUGHLIN: I object to that.

The COURT: Objection sustained. Do not answer that.

Mr. JOHNSON: I think that is all.

Mr. McLAUGHLIN: I have nothing to ask him.

The COURT: I have a few questions.

By the COURT:

Q. Let me get this clear: At some time during the course of the jury's deliberations, you voted "Guilty" as to Stance James and as to Oliver James, didn't you?

A. Yes, sir.

Q. Did anybody compel you to vote "Guilty"?

A. No, sir, no one compelled me to.

The COURT: I think that is the answer to this situation. I will hear both of you on it.

Do you want to ask him anything, Mr. McLaughlin?

Mr. McLAUGHLIN: No, Your Honor.

The COURT: That is all. Just have a seat back there.
(R. 1812-1821)

* * * * *

By Mr. JOHNSON:

Q. Your question to me, when you saw me in the jury room, was, "What would have happened to me if I had said, 'Not Guilty'?" Wasn't that your language to me?

A. Yes.

Q. What did you mean by "Happened" to you?

A. Well, what I meant about that, I just had in mind that maybe something would have happened if I had said, "Not Guilty." I actually wanted to say, "Not Guilty," when you asked each one, one by one, but I didn't know what would happen if I said, "Not Guilty."

Q. Did you think from what this foreman told you—

Mr. McLAUGHLIN: I object. The man has already stated his frame of mind.

By the COURT:

Q. Did anyone ever tell you anything would happen to you if you changed your vote after you got back in the court room?

A. Well, they had me under the impression that something would happen if I said, "Not Guilty."

Q. What was said to you that gave you that impression?

A. Well, what gave me that impression—because they said I couldn't do that. I couldn't change from "Guilty" to "Not Guilty." I couldn't do that.

Q. You thought that something could happen to you?

A. Yes, I didn't know what. No one said nothing about what would happen.

By Mr. JOHNSON:

Q. But did you think it was something pleasant that would happen to you, or unpleasant?

Mr. McLAUGHLIN: I object.

The COURT: Sustained. I guess I can take judicial notice that I do not think it would be pleasant. (R. 1824-1825)

It is seen from this that Jones was persuaded by the arguments of the other jurors to vote guilty as to the James brothers after he knew that the jury had already acquitted Singleton (R. 1813); that no one forced him to vote guilty (R. 1814, 1820); that no one told him he had to vote guilty (R. 1814); that later he wanted to change his vote on the James brothers to not guilty but was told he could not change (R. 1815); and that he had the impression that something would happen to him if he did change his vote (R. 1825). All of this took place in the jury room; no outside influence was exerted upon Jones; and there is no evidence that anyone in the jury room made any threats or told him anything except that he could not change his vote.

The federal courts have long followed the rule that a juror cannot testify to the motives and reasons influencing the jury's verdict unless the testimony relates to extraneous influences or external causes tending to prevent the exercise

of unbiased judgment. This Court approved this rule in *Hyde v. United States*, 35 App. D. C. 451, when it said:

It is a general rule, founded on the soundest public policy, that the testimony of jurors relating to the motives and reasons influencing their verdict will not be received. The only exception to this rule is where it relates to extraneous influences and external causes tending to prevent the exercise of unbiased judgment.

That case was taken to the Supreme Court, 225 U. S. 347, and that Court stated:

The motion for a new trial set forth that the verdict was the result of an agreement between certain of the jurors who believed all of the defendants should be convicted and certain jurors who believed that all of the defendants should be acquitted, by which agreement the acquittal of Benson was exchanged for the conviction of Hyde and the conviction of Schneider for the acquittal of Dimond. And this was brought about, it is contended and argued, as the result of what, "under the circumstances, amounted to coercion by the court."

There is nothing in the record to justify the contention. * * *

But even conceiving such possibility, we think the court rightly ruled. It was within the issues of the case to convict some of the defendants and acquit others, and we think the rule expressed in *Wright v. Illinois & M. Taleg Co.*, 20 Iowa, 195, and *Gottlieb Bros. v. Jasper*, 27 Kan. 770, should apply, that the testimony of jurors should not be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of the jurors, and can receive no corroboration.

In *Gottlieb Bros. v. Jasper*, 27 Kan. 770, cited with approval by the Supreme Court in the *Hyde* case, *supra*, the court said:

Of course the testimony of jurors cannot be received to show matters which essentially inhere in their verdict. A juror cannot be introduced to show that he did not agree to the verdict; or that he intended something different from what he in fact found; or that he was misled by some remark of the court, or counsel, or his

fellow jurors; or that he was influenced by his fellow jurors, or by others; * * *

The reasons for the rule were stated by the Supreme Court in *MacDonald v. Pless*, 238 U. S. 264, when it said:

For while by statute in a few jurisdictions, and by decisions in others, the affidavit of a juror may be received to prove the misconduct of himself and his fellows, the weight of authority is that a juror cannot impeach his own verdict. The rule is based upon controlling considerations of a public policy which in these cases chooses the lesser of two evils. When the affidavit of a juror, as to the misconduct of himself or the other members of the jury, is made the basis of a motion for a new trial the court must choose between redressing the injury of the private litigant and inflicting the public injury which would result if jurors were permitted to testify as to what had happened in the jury room.

These two conflicting considerations are illustrated in the present case. If the facts were as stated in the affidavit the jury adopted an arbitrary and unjust method in arriving at their verdict, and the defendant ought to have had relief, if the facts could have been proved by witnesses who were competent to testify in a proceeding to set aside the verdict. But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be and many would be followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party, in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.

See also *Hendrix v. United States*, 219 U. S. 70; *Jordon v. United States*, 66 App. D. C. 309, 87 F. 2d 64, certiorari denied 303 U. S. 654; *Economon v. Barry-Pate Motor Co.*, 55 App. D. C. 143, 3 F. 2d 84; *Black v. United States*, 294 F.

82, certiorari denied 264 U. S. 580; *Walsh v. United States*, 174 F. 615, certiorari denied 215 U. S. 609; and 90 A.L.R. 249. For a case illustrating an exception to the rule see *Mattox v. United States*, 146 U. S. 140, where the court ruled that affidavits of jurors were admissible to show that during the deliberations of the jury a newspaper article was read to the jury, the tendency of which was injurious to the accused. This Court in *Freid v. McGrath*, 77 U. S. App. D. C. 385, 135 F. 2d 833, made an exception where it was alleged the jury's true verdict was mistakenly reported, i.e., a verdict of \$425.00 was announced when actually, it was alleged, the agreed verdict was \$850.00. That case is readily distinguishable from the instant case, as here the juror testified that he had agreed to the verdict of guilty and no one had compelled him to so vote (R. 1820); and that he wanted to change his verdict but was told in the jury room he could not change his verdict (R. 1815).

The facts in this case are similar to those in the case of *Lancaster v. United States*, 39 F. 2d 30 where affidavits of several jurors were offered to show that they were told by the majority of the jury that a verdict would not be received which did not either convict or acquit each defendant and that a recommendation to mercy would have the effect of requiring the court to impose fines. Several of the jurors stated they had serious doubt about the guilt of any defendant, and would not have agreed to the verdict rendered, which contained a recommendation to mercy, except for the representation made as to the effect of the verdict upon the sentence. Thus in that case the jurors were misled by two misstatements of the law—one that they had to agree to convict or acquit each defendant and the other that a recommendation to mercy would require the court to impose a fine only. In the case before this court the juror was only told he could not change his verdict once he had agreed to it as it was against the rules. No juror ever told him anything would happen to him if he changed his verdict although he testified he got an impression something would happen from their telling him he could not change his verdict. Thus it is seen that Jones was, like

the jurors in the *Lancaster* case, misled by a misstatement as to the law. In affirming the convictions in the *Lancaster* case the court stated:

The charges of misconduct of the jury find no support except in the affidavits of some of the jurors as to the method of arriving at a verdict. Corruption of the jury is not claimed. The general rule is that jurors will not be heard to impeach their own verdict. * * *

Under the last cited authority it was the duty of the trial court not to give any weight to the affidavits of the jurors.

Thus it is seen that the testimony of Jones went to show matters which inhere in the verdict and did not show extraneous influences or external causes and, therefore, such testimony is not admissible.

VI

No Error Is Committed When the Trial Court Refuses to Allow a Wire Recording to Be Played Which Has Not Been Properly Identified Nor Properly Offered

In considering this point appellee desires that the Court consider, in addition to the pages certified by appellant, the following record pages: 470-475, 472, 494, 517-519, 814-823, 833-842, 1032.

Appellants allege that the trial court committed error in excluding evidence of a wire recording of a telephone conversation between a Government witness and two defense witnesses (Br. 31). A reading of the record will disclose that it does not support this allegation. The record discloses that reference to the wire recording is made on the following pages: 471, 475, 488 to 494, 517 to 519, 814 to 823, 833 to 842, 866 to 876, 895 to 899, and 902 to 904. The wire recording was first mentioned by Edward James under cross-examination on page 471. The first time the appellants tried to introduce the wire recording into evidence was while Edward James was on the witness stand and after he had admitted a telephone conversation with the witnesses Sneed and Flanders and had recalled part of it but

not all of it. The record was played to Edward James out of the hearing of the jury and he denied that the voice in the record was his. At page 492 of the record Mr. Johnson requested permission to play the record to the jury and the court stated,

No, you cannot, certainly not now. I don't know whether later it may become pertinent but there is no foundation laid for the use of that machine. He has heard it in the absence of the jury. You played some of it and he heard some of it and he said that wasn't his voice, and the jury won't be able to tell whether it is his voice or not.

The ruling of the court in excluding the wire recording at this stage of the trial was correct due to the fact that the recording had not been identified by anyone as the recording made of the telephone conversation, nor had any of the participants identified their voices.

The next time that permission is requested to play the wire recording is at page 833 when permission is requested to play it for the purpose of having the witness Sneed identify the recording. After some discussion the court grants appellants' request to play the recording (R. 839). It was not played because the machine would not work (R. 840-842). This was on Thursday, May 19, 1949, and at the conclusion of the day, the trial was recessed until Monday, May 23, 1949.

On Monday morning the prosecutor objected to the playing of the recording on the basis of the Second Circuit decision in *United States v. Polakoff*, 112 F. 2d 888 (R. 866). The court, after a discussion of the *Polakoff* case, stated:

* * * and I am of the opinion it is not applicable, and I will sustain the Government's objection to the use of the record. You have made your point. (R. 873-874)

However, after this, counsel for appellant prevailed upon the court to keep the question open and the court indicated it would do so when it said:

Suppose we do this, because I do not want to take any more time. You get me a list of the cases that you

think support your position and I will read the case overnight and we will discuss it. (R. 875, 876)

That the court had not finally ruled on the question is seen later when discussing Edward James Mr. Johnson said:

Is Your Honor going to rule on the question of whether I can call him and ask him if he will give consent?

The court replied:

That isn't now before me. I haven't decided that. (R. 889)

and again at page 895 of the record, where the following occurred:

Q. And prior to the time you had that conversation did I show you any instrument——

Mr. McLAUGHLIN: I object to that, your Honor; it has been ruled on.

Mr. JOHNSON: No, not the fact.

Mr. McLAUGHLIN: It doesn't make any difference.

The COURT: He has a right to lay a foundation for it; he can't complain of the Court's ruling unless he lays the foundation.

Mr. McLAUGHLIN: I thought you had ruled on it.

The COURT: Go ahead.

Counsel then had the witness (Flanders) relate that the recording had been made and played back to him and he testified he had recognized the voices. (R. 898-899)

At page 1032 of the record the court asked:

Have you a list of the cases you want me to read?

and Mr. Johnson replied:

They are being prepared now.

The court then stated:

All right. I will look at them tomorrow.

After this there is no mention of the recording in the transcript. Whether counsel for appellants concluded the

recording was inadmissible is not shown, but a reading of the transcript reveals that no further request to play the recording was made, nor was the recording ever identified by anyone as the recording that was made the evening of the telephone conversation between Sneed, Flanders, and Edward James, nor was Edward James ever called to the witness stand to give his consent to the playing of the recording. Thus it is seen that the court never actually excluded the recording but instead that appellants dropped the matter without properly identifying the recording and without giving the court the opportunity to finally rule upon the admissibility of the recording. As the court did not exclude the recording, there is no basis for the allegation of error.

It is submitted that the recording was inadmissible under statute⁷ as the parties had not consented to either the making of the recording or the use of it. *United States v. Polakoff*, 112 F. 2d 888. The appellants argue that Charles James did not object to the playing and that the court refused to permit counsel to seek permission of Charles James to divulge the conversation (Br. 32). While Charles James did not object, he did not have an opportunity to do so. The trial court at no time refused to permit counsel to seek permission of Charles James to play the recording. During the direct examination of Dennis Flanders counsel asked the court:

Is your Honor going to rule on the question of whether I can call him and ask him if he will give his consent?

and the court replied:

That isn't now before me. I haven't decided that. (R. 889).

At no time after that did appellants request permission to place Charles James on the stand nor did they attempt to do so. Thus he was never asked to consent to the playing of the recording nor did he ever consent to having it played.

⁷ Title 47, U. S. Code 605 (1946 ed.)

In any event it was not error for the trial court to refuse to allow the recording of a telephone conversation to be played to the jury. Appellants contend that the recording would impeach Charles E. James' testimony that he had not promised two witnesses, with whom he had the telephone conversation, a motorcycle each (Br. 31). Actually James did not testify that he had not promised the two witnesses a motorcycle. He testified that he did not during the course of the recorded conversation mention motorcycles to both of them but only mentioned it to one (R. 470). This is shown to be true when Sneed testified he did not remember any conversation with Charles James about a motorcycle during the recorded conversation (R. 823). In his testimony Charles James admitted offering both boys a motorcycle and stated he was still promising them a motorcycle when business picked up (R. 471-472). Thus it is seen that the recording would not have contradicted Charles James as his testimony as to the telephone conversation was the same as the testimony of the other parties. Furthermore, this was a conversation between Charles James, Sneed and Flanders, and since both Sneed and Flanders took the stand and testified for appellants as to the contents of the conversation, we are unable to see how the recording itself could add anything of importance to the defense.

VII

Counsel in Closing Arguments Are Given Wide Latitude as Long as There Is a Basis of Fact for Their Assertions

In considering this point appellee desires that the Court consider, in addition to the pages certified by appellants, the following record pages: 540, 541, 543-546, 549, 586 - 589.

Appellants urge that they were prejudiced by repeated unfair inferences, suggestions, and statements in which the assistant United States Attorney in his argument to the jury by false charges, innuendo and otherwise left the impression with the jury that defense counsel were guilty of misconduct (Br. 33). It is recognized that a prosecutor may not strike foul blows, but as the Supreme Court said

in *Berger v. United States*, 295 U.S. 78, he should prosecute with earnestness and vigor and may strike hard blows and his duty is to use every legitimate means to bring about a just conviction. A reading of the argument made by the prosecutor in this case will show that he often hit hard, fair blows, but never struck foul ones. The law is settled that counsel in closing arguments are given wide latitude as long as there is a basis of fact for their assertions. *Pritchett v. United States*, No. 10,544, decided November 9, 1950. The argument made by the prosecutor in this case was amply supported by the evidence. If this evidence reflects on counsel, it cannot be said that this was not of their own making.

The first quotation from the argument cited by appellants is found at page 1179 of the record. It is alleged that this statement is a bold accusation that counsel committed a criminal offense, viz., subornation of perjury. How such an interpretation can be placed on the argument quoted is not shown and it is submitted that the argument did not charge counsel with any criminal offense. It merely stated that members of Ed James' family had tried to get him to retract the statement that he had made to the prosecutor and that he had contacted Mr. Mitchell, one of defense counsel, who sent him to another attorney. The prosecutor argued that this was done to gang up on the District Attorney's office to try to defeat justice. He argued that the honest and legitimate thing to have done would have been to send Ed James to the prosecutor. Surely, the natural thing for Mr. Mitchell to have done would be to send Ed James to the District Attorney's office and not to another attorney's office. While it is impossible to read Mr. Mitchell's mind to see what he intended, it is submitted that the inference drawn by the prosecutor was not unwarranted.

The second quotation from the prosecutor's argument that is considered objectionable is found at page 1192 of the record and is relative to switching of the coins (Br. 34). Appellants allege that this argument was an accusation that defense counsel switched the coins (Br. 34). In fact, no such accusation was made. A reading of that part

of the argument objected to will show that the prosecutor said that the coins had been switched then said, "Because I say to you, if the *defendants* and their attorneys, if they have as much interest as that, to bring these two boys, the Sneed boy and the Flanders boy, up in their office, along with the two defendants, and keep them from 9:30 to 2:00 in the morning, then I say they are liable to do anything to deceive you in this case, in order to defeat justice." Thus we see that the defendants as well as their counsel were included in that part of the argument which is objected to. At no time did the prosecutor say either the defendants or their counsel had switched the coins—he left this up to the jury.

There was ample evidence to support a charge that the coins had been switched. Officer Lubore had testified that he had searched the home of Oliver James on February 20th and had found, among other things, some coins and all these were turned over to the deputy marshal (R. 543-546); that later the same day at Police Headquarters Beckley had identified one of the coins found as his because of an X-mark that he had placed on the coin (R. 586); that the coins had then been given again to the deputy marshal (R. 588); that he could not identify the coin shown him at the trial as the coin that Beckley identified at Police Headquarters as the mark appeared to be different (R. 585-589); and that after turning the marked coin over to Mr. Ward at Police Headquarters the next time he saw the marked coin was "Yesterday on the stand." Officer Lubore's testimony covered two days—Tuesday and Wednesday. On Tuesday, he was shown the coins [this is established by the record at page 544 where the prosecutor said: "I will show you, I believe it is Government Exhibit 3, and ask you to look at those coins. I believe there is another one there. They have been separated" and at page 588, where in response to the following question concerning the coin, "And have you ever seen that coin again from that time up until today here on the stand?", the officer answered, "Yesterday on the stand."] and again on Wednesday he was shown the coins (R. 584). On Tuesday Officer Lubore was not asked to identify the coins although they were

shown him and when shown the marked coin on Wednesday he could not identify the coin. This shows that sometime after Beckley had identified the coin at Police Headquarters (February 20, 1949) and Wednesday, May 18, 1949, the coin had been switched. By a closer reading of the record it can be determined that the coins were switched sometime between Tuesday, May 17, 1949, and Wednesday, May 18, 1949. This is determined from the following facts:

1. Lubore had seen Beckley identify the coin at Police Headquarters and had inspected the coin there himself. (R. 549.)

2. Lubore was shown the coins on Tuesday when he was on the witness stand. (R. 544)

3. On Wednesday Lubore was asked "And have you ever seen that coin again from that time (when he had given the coin to Mr. Ward after Beckley had identified it) up until today here on the stand?" and Lubore replied, "Yesterday on the stand." (R. 588.)

4. On Wednesday Lubore could not identify the marked coin shown him as the coin Beckley had identified (R. 589).

From this it is seen that on Tuesday while on the witness stand Lubore had seen the same coin that Beckley had identified at Police Headquarters and which he, Lubore, had turned over to Ward; and that on Wednesday when shown the supposed same coin, Lubore could not identify it as the mark was different (R. 585, 589). Thus it is seen that the coins were switched sometime between the time Lubore saw it from that witness stand on Tuesday and the time he was asked to identify it on Wednesday. It is submitted that the only parties who could hope to gain by such a switching of coins would be the appellants or their counsel. Therefore, the prosecutor was arguing from the evidence when he commented on this and while it undoubtedly was a hard blow it most certainly was not a low one.

Appellant relies (Br. 34) upon the case of *Berger v. United States, supra*. Certainly, the argument of Government counsel in the instant case cannot be said to have ap-

proached the gross misconduct of the prosecutor in the *Berger* case, who (295 U.S. at 84)

* * * was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand a witness had said something which he had not said and persistently cross-examined the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner.

Nor can it be said to approach the misconduct of the prosecutor in *Hall v. United States*, 150 U.S. 76, where the court said:

The attempt of the prosecuting officer of the United States to induce the jury to assume without any evidence thereof, the defendant's guilt of a crime of which he has been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court and the jury directed to allow it no weight.

In footnote 1 under Point V appellants state "For other examples of unfair comments by the prosecution, see transcript of proceedings, pages 1190, 1192, 1193, 1181, 1180, 1179, 1307, 1308, 1317, 1318." Apparently this footnote was misplaced and the Government is treating it as applicable to Point VII and, therefore, is discussing it here. Pages 1192 and 1179 contain those parts of the argument discussed above so are not treated again here. A reading of the other pages cited along with a reading of the whole record will show that the arguments contained on those pages were fair comment by the prosecutor and that he at no time overstepped the boundaries allowed the prosecution.

In *Meyers v. United States*, 84 U.S. App. D.C. 101, 171 F. 2d 800, 812, certiorari denied 336 U.S. 912, this Court stated that the complaint concerning the prosecutor's argument to the jury did not impress it as requiring discussion. Portions of the prosecutor's argument to the jury in that case are set forth below.⁸ Much less worthy of discussion is appellants' claim that Government counsel's argument to the jury was improper in the instant case.

CONCLUSION

It is respectfully submitted that the judgment of the lower court should be affirmed.

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ARTHUR J. McLAUGHLIN,
JOSEPH M. HOWARD,
RICHARD M. ROBERTS,
Assistant United States Attorneys.

⁸ In that case Government counsel repeatedly referred to the defendant as a "bird" and said (R. 1961, 1964):

Why he was a gentleman, he got a large sum of money, driving around in Cadillac automobiles, living in an apartment with air-cooling systems, living on the high profits from a corporation that he owns while the boys were in the South Pacific sweating, he was living in the cool of his apartment in Hotel 2400. That bird sure had champagne tastes.

He has no room to holler, he enjoyed this war.

Again Government counsel argued (defendant's petition for a writ of certiorari, p. 7):

Well, you people, you ladies here who had sons overseas, everybody sacrificed but Meyers was living on the fat of the land and was he sent overseas to fight and bleed and perhaps die? Meyers was here living on the fat of the land.

